Not only does it seem to me that the question at issue was one which could be decided by the Magistrate, but also there appears to exist express provision for enforcing the very type of Order which was made. The provisions of the Kedah Civil Procedure Code relating to the Mode of Executing Decrees clearly apply to all Courts and amongst them is section 116 which reads as follows :—

> If the decree be for the specific performance of a contract or for the performance of or abstention from any particular act and the party against whom it was made has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced by his imprisonment for contempt of Court or by the attachment of his property, or by both.

Here the decree made by the Magistrate is for the performance of a particular act by the parties against whom it was made — viz. to re-transfer the land. The appellant, being the registered proprietor, is in a position to effect this re-transfer and having been found a party to the original fraud, has been properly ordered to do so.

For the above reasons I am of opinion that the Magistrate in this case had jurisdiction to hear and determine the suit. The appeal is dismissed with costs.

Russell, J. : — I have had the advantage of reading the judgment of the learned President. I agree with it and do not wish to add anything.

Briggs, J. : — I too have had the advantage of reading the judgment of the learned President. I also agree with it and have nothing to add.

Appeal Dismissed.

SEE YEW POO v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Willan, C.J., Spenser-Wilkinson and Russell, JJ.) December 9, 1948]

[K.L. — Criminal Appeal No. 129 of 1948]

Criminal Procedure Code Ss. 163, 164, 422 — Separate charge for every distinct offence — Whether failure to comply with provisions of Section 163 of the Criminal Procedure Code is an illegality or an irregularity — Deposition of absent witness — Evidence Enactment S. 33.

This was an appeal against the conviction of the appellant on the following charge "That you between 7 and 8 p.m. on the 20th of May 1948 on Chuan Moh San Estate, Tenang, in the State of Johore, robbed Tee Puet Kiat and Tee Kern and at the time of committing the said robbery you were armed with a deadly weapon, to wit a revolver and that you thereby committed an offence punishable under Sections 392 and 397 of the Penal Code" At the trial the deposition of a witness who was under arrest at the time of the trial was admitted.

Held, (1) that in the present case each of the offences should have been made the subject of a separate charge; (2) that the duplicity of charges was merely an irregularity which can be cured under the provisions of Section 422 of the Criminal Procedure Code provided that the accused was not prejudiced and there was no failure of justice occasioned by the irregularity; (3) that in fact the framing of the charge in the case caused confusion in the mind of the learned judge and that therefore there was the possibility of a failure of justice; (4) that the power to admit the deposition of absent witnesses under Section 33 of the Evidence Enactment should be exercised with caution and as there was nothing on the record to show that the witness could not, by care and the use of ordinary means, have been produced to give evidence, the deposition was improperly admitted in evidence in this case.

Cases referred to :—

(1) *N. A. Subramania Iyer v. King Emperor* (1900-1) 28 Indian Appeals 257.

(2) *Gul Mohamed Sircar v. Cheraru Mandal* (1905) 10 Cal. W.N. 53.

(3) *Emperor v. Fattu* (1903) I.L.R. 26 Allahabad 195.

(4) *Johan Subarna v. King Emperor* (1905) 10 Cal. W.N. 520.

(5) *Ram Subheg Singh v. King Emperor* (1914-15) 19 Cal. W.N. 972.

(6) *Maharuddin Malita v. Jadu Nath Mandal* (1906) II Cal. W.N. 54.

(7) *Musai Singh v. King Emperor* (1913) I.L.R. 41 Cal. 66.

(8) *Superintendent and Remembrancer of Legal Affairs, Bengal v. Daulatram Mudi* (1932) 50 I.L.R. Cal. 1233.

(9) *Sachidanand Prasad v. Emperor* (1933) A.I.R. Patna 488.

(10) *Mendilal v. Emperor* (1934) A.I.R. (Oudh) 244.

(11) *Yap Leow Swee v. Public Prosecutor* (1937) F.M.S.L.R. 71; (1937) M.L.J. 225.

(12) *Mowyar alias Nane Khan v. The Queen* 20 Cal. Weekly Reporter 69.

CRIMINAL APPEAL.

K. C. Chia for the Appellant.

A. M. I. Austin (D. P. P.) for the Respondent.

The judgment of the Court of Appeal was delivered by :—

Russell, J. : — The appellant was charged with the armed robbery of two persons Tee Puet Kiat and Tee Kern on Chuan Moh San estate, Tenang, in the State of Johore between 7 and 8 p.m. on the 20th of May, 1948, an offence punishable under sections 392 and

397 of the Penal Code. The prosecution evidence tended to show that on this particular evening a number of people were robbed in three different coffee-shops on the above estate, the three shops being situated on the estate road within a distance of some 30 to 40 yards of each other. The two complainants alleged that they were robbed in two different shops at different times, the first robbery taking place at 7 p.m. and the second at 8 p.m. Only one charge was framed against the appellant in respect of the two robberies which read as follows :—

> That you between 7 and 8 p.m. on the 20th of May, 1948 on Chuan Moh San Estate, Tenang in the State of Johore, robbed Tee Puet Kiat and Tee Khern and at the time of committing the said robbery you were armed with a deadly weapon, to wit a revolver and that you thereby committed an offence punishable under sections 392 and 397 of the Penal Code.

It was argued on behalf of the appellant that the framing of one charge in respect of two robberies was an illegality and that the trial was thereby vitiated.

Section 163 of the Criminal Procedure Code provides that for every distinct offence of which any person is accused there shall be a separate charge and the robbery of two different persons in different places at different times is clearly two distinct offences and two separate charges ought to have been framed against the appellant in respect thereof. We have therefore to decide whether this failure to frame two separate charges is an illegality or only an irregularity which can be cured under the provisions of section 422 of the above-mentioned Code.

In support of his argument that this failure was an illegality, Mr. Chia, counsel for the appellant, relied on the case of *N. A. Subramania Iyer v. King Emperor*[1]. This case was a decision of the Privy Council and was followed in two later cases, also quoted by Mr. Chia. These two cases are : — *Gul Mohamed Sircar v. Cheraru Mandal*[2], *Emperor v. Fattu*[3].

The first of these two decisions was a decision of the High Court of Calcutta sitting in its Criminal Revisional jurisdiction and the two learned judges were of the opinion that the joinder in one charge of the two distinct offences though arising out of the same transaction was an illegality fatal to the trial.

In the latter case the accused was charged in the same charge with, and convicted of, committing three or four dacoities on the same night in different houses. It was held that the conviction could not be sustained, the Court holding that there ought to have been a separate charge in respect of each dacoity.

Again, in the case of *Johan Subarna v. King Emperor*[4] the Calcutta High Court held that the joinder in one charge of two offences, namely, attempted cheating, committed on two successive dates was an illegality which vitiated the trial and which could not be cured by section 537 of the Indian Criminal Procedure Code which corresponds to section 422.

In each of these three cases the learned Judges based their decision upon *Subramania's* case being of the opinion that in that case Their Lordships of the Privy Council decided that a defect under section 233 was fatal to the trial.

This decision of Their Lordships was reviewed in the case of *Ram Subheg Singh v. King Emperor*[5] where Sharfuddin, J. (Beachcroft, J. and Fletcher, J. having differed) held that *Subramania's* case was not an authority for the proposition that failure to observe the first part of section 233 was fatal to a trial, and he further held that where a charge was framed against an accused person in respect of hurt to two persons, the omission to frame two separate charges was an irregularity which could be cured under section 537 of the Indian Criminal Procedure Code, if in fact no failure of justice had been occasioned thereby.

The head-note in the English Law Reports, 28 Indian Appeals page 257 to *Subramania's* case reads as follows :—

> Section 234 of the Criminal Procedure Code which provides that a person may only be tried for three offences of the same kind if committed within a period of twelve months is plainly contravened by trying an accused on an indictment charging him with no less than forty-one acts extending over a period of two years.
>
> A trial so conducted is plainly prohibited and illegal and a conviction must be set aside.

This head-note, we think, correctly sets out the substance of the decision and it will be seen, therefore, that *Subramania's* case was not a decision upon section 233 of the Criminal Procedure Code nor was that section anywhere referred to in Their Lordships' judgment which was delivered by the Lord Chancellor, the Earl of Halsbury. In that decision Their Lordships were of the opinion that the whole trial had been illegally conducted and they were unable to regard the disobedience to an express provision in the Code as a mere irregularity.

We are in agreement with the decision in the case of *Ram Subheg v. King Emperor* that the expression "mode of trial" is not applicable to a case of this kind where there is no more than a formal defect of drawing up one charge instead of two. Moreover, we think that the learned Judges who decided the cases *Gul Mohamed Sircar v. Cheraru Mandal*, *Emperor v. Fattu*

and *Johan Subarna v. King Emperor* (*supra*) may have been misled by the inaccurate head-note which appears in the Indian Law Reports (25 Madras p. 61) in the report of *Subramania's* case. This head-note refers to section 233 of the Criminal Procedure Code and is not the head-note quoted above. The decision in the case of *Ram Subheg v. King Emperor* followed two earlier decisions : — *Maharuddin Malita v. Jadu Nath Mandal* [6], *Musai Singh v. The King Emperor*[7].

In the former case the learned Judges held that where an accused had been convicted of three separate offences of theft and separately sentenced the fact that all three charges were included in one formal charge was an irregularity and not an illegality; and in the latter case that the decision in *Subramania's* case did not affect a conviction for three distinct offences of cheating although there was only one charge covering the three acts. Later decisions which support the view that the failure to frame separate charges is a formal defect which can be cured by section 537 if the accused has not been misled by the error or if no failure of justice was occasioned thereby are : — *Superintendent and Remembrancer of Legal Affairs, Bengal v. Daulat-ram Mudi*[8], *Sachidanand Prasad v. Emperor*[9], *Mendila! v. Emperor*[10].

The question whether duplicity in a charge was a mere irregularity which can be cured was also considered in *Yap Leow Swee v. Public Prosecutor*[11]. In that case the duplicity consisted of two alternative charges in the same charge and it was impossible for the defendant to know with certainty with what he was charged and of what he was convicted. Terrell, J. in his judgment, after referring to a note in *Sohoni*, which now appears in the 14th edition as note 7 on page 472, stated as follows :—

> The cases there dealt with are cases of separate offences contained in a single charge, where the prosecution set out to prove each of such offences, and each offence could have been the subject of a separate charge. This has been held in British India to be an irregularity which is curable, unless it can be shown that the accused has been prejudiced in that there has been a failure of justice, under a section which corresponds to section 422 of the Federated Malay States Criminal Procedure Code. But in a case like the present the prosecution do not set out to prove both recklessness and negligence, but merely one or the other. Accordingly the accused is embarrassed in his plea, and if he is convicted he is left in doubt as to the offence of which he has been convicted.

We are therefore of the opinion that, as in the present case each of the offences could have been the subject of a separate charge, and could have been proceeded with at one trial, the duplicity was merely an irregularity which can be cured under the provision of section 422 provided that the accused was not prejudiced and there was no failure of justice occasioned by the irregularity.

In considering this further point it seems patent to us from the record that the learned trial Judge has not kept clear in his mind that there were two distinct and separate offences contained in the one charge and that he has not considered the evidence in respect of each alleged offence separately. He has in fact made one single finding and imposed one punishment for the two offences. Moreover, after stating in his grounds of judgment that he was satisfied that the prosecution case was true he went on to state that "the accused was properly identified by various people who saw him in the three shops robbed at or about the same time." There is no evidence that we can find in the record of anybody having identified the accused as ever being in any third shop whatsoever.

In the case of *Sachidanand Prasad v. Emperor* referred to above it was stated that the failure to comply with section 233 would be condoned where the offences were committed in one transaction, where the evidence is identical, and where care has been taken to consider each item of charge separately and arrive at a distinct finding regarding each one of the offences charged. In that case only a single charge was framed in respect of two similar offences committed on different days and the learned Judge instead of keeping the offences distinct and separate asked the jury only for a single finding. It was held that this procedure was likely to cause confusion and interfered with the definite proof of a distinct offence which it is the object of all criminal procedure to obtain and the Court ordered a re-trial.

We think that the framing of the charge in this particular case caused confusion in the mind of the learned Judge and that it is impossible for us to say that a failure of justice has not been occasioned.

Mr. Chia also referred to certain evidence given by the witnesses Tee Puet Kiat and Teo Hock San as having been improperly admitted as hearsay evidence. We think Mr. Chia was right in this submission but in view of our decision upon the validity of the charge it is unnecessary for us to consider how far the appellant was prejudiced thereby. We should, however, like to refer to the admission of the deposition of the witness Lai Chow. The evidence of the O.C.P.D. Labis showed that this witness was under arrest at the time of the trial in Johore Bahru. We think that the power to admit the deposition of absent witnesses under section 33 of the Evidence Enactment should be

exercised with caution and there was nothing on the record to show that this witness could not, by care and the use of ordinary means, have been produced to give evidence. We therefore think that this deposition was improperly admitted *Mowyar alias Nane Khan v. The Queen*[12].

For these reasons we order that the conviction be set aside and the sentence quashed.

We are of the opinion that the admissible evidence in the record in regard to the alleged robbery by the appellant in the second coffee-shop was inadequate to support a conviction and that no fresh trial should be allowed in respect of this offence. With regard to the alleged robbery in the first coffee-shop, however, it appears to us that had the trial been otherwise properly conducted there might have been sufficient evidence to support a conviction upon this charge. We therefore order that the accused be re-tried only upon a charge of robbing Tee Puet Kiat.

Appeal Allowed.
Re-trial Ordered.

LEE KIM LAI (f) v. T. R. SUNDRAM AND ANOTHER.

[App. Civil Juris. (Storr, J.) January 28, 1949]

[Ipoh — Civil Appeal No. 11 of 1948]

Civil Procedure Code Ss. 127 and 597 — Application to set aside an exparte decree by a person not a party to the suit.

In this case the appellant had applied to set aside a judgment for possession obtained ex parte against the second respondent. She alleged that she was the real defendant in the Civil Suit and not the second respondent who was her former husband. The District Judge refused her application.

Held, that only a defendant to a suit could apply under S. 127 of the Civil Procedure Code to set aside an exparte decree and not just any person who might be interested in the suit.

Cases referred to :—

(1) *Debendra Narain Sinha v. Narendra Narain Sinha* 24 Cal. W.N. 110 at p. 116.

(2) *Jacques v. Harrison* (1884) 12 Q.B.D. 165.

(3) *Bacha Sham Sunder Keur & others v. Balgobind Singh* A.I.R. 1930 Patna 323.

(4) *Susil Chandra Guha & another v. Gouri Sundari Devi & others* A.I.R. 1926 Cal. 1015.

CIVIL APPEAL.

S. K. Das (*Tan Cheng Hock* with him) for the Appellant.

M. S. Mahendran for the first Respondent.

Storr, J. : — This was an appeal from an Order of the District Judge, Perak South, made on the 18th August, 1948, on an application by the Appellant under Section 127, Civil Procedure Code, to set aside the judgment, obtained *ex parte* against the 2nd Respondent, dated the 11th June, 1948, and the consequent Warrant of Ejectment dated 12th June, 1948, in District Court Civil Suit No. 28/48. The grounds of the application were set out in an affidavit by the Appellant dated 18th June, 1948. These were that the Appellant was in fact the real Defendant in District Court Civil Suit No. 28/48 and the tenant of the 1st Respondent, and not the 2nd Respondent against whom the judgment was entered, being her former husband. The learned District Judge dismissed the application on the grounds that the Summons was duly served on the Defendant (2nd Respondent) named in the Summons by the Plaintiff (1st Respondent) pointing him out to the Process Server and that only a Defendant to a suit could apply under Section 127, Civil Procedure Code, to set aside an *ex parte* decree and not just any person who might be interested in the suit.

Mr. S. K. Das (Mr. Tan Cheng Hock with him) appeared for the Appellant and argued that before the District Judge came to any decision on the application under Section 127, Civil Procedure Code, he should have decided the issue as to whether or not the Appellant was the tenant of the 1st Respondent and the person who should have been served as the Defendant or not, and, if she was so found, to have set aside the decree, but in any event the Appellant being a person interested in the suit was entitled to have the *ex parte* decree set aside under Section 127, Civil Procedure Code, and the Order of the District Judge was wrong. He cited the following cases in support of his submission: *Debendra Narain Sinha v. Narendra Narain Sinha*[1], *Jacques v. Harrison*[2] and *Bacha Sham Sunder Keur & ors. v. Balgobind Singh*[3]. Finally, he submitted that under Section 597, Civil Procedure Code, the Court had inherent powers to do that which would ensure that justice was done.

Mr. Mahendran, who appeared for the 1st Respondent, submitted that the Order of the District Judge was correct not only as to his ruling that Section